MAR 26 2001
CLERK

No. 00-1305

IN THE
SUPREME COURT OF THE UNITED STATES

Kismet Investors, Inc., a
Minnesota corporation,

Petitioner,

vs.

County of Benton,

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RANDALL TIGUE LAW OFFICE, P.A.

Randall D.B. Tigue, Esq.
2940 Pillsbury Avenue South
Suite No. 9
Minneapolis, MN 55408
612/825-0936

Attorney for Petitioners

TABLE OF CONTENTS

Introduction 1

Statement of facts 1

Argument 4

I. A substantial question exists as to whether the Benton County ordinance is narrowly tailored to those uses found to cause adverse secondary effects 4

II. The ordinance would have the effect of suppressing or greatly limiting access to constitutionally protected speech 9

Conclusion 10

TABLE OF AUTHORITIES

COURT RULES:

Supreme Court Rule 15.5 1

Supreme Court Rule 15.8 1

Rule 56 of the Federal Rules of Civil Procedure 5

Rule 56 of the Minnesota Rules of Civil Procedure 5

CASES:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 5

Alameda Books, Inc. v. City of Los Angeles, 222 F. 3d 719 (9th Cir. 2000) 5

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 9

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 52 (1986) 4, 8

Flanigan's Enterprises, Inc. v. Fulton County, Ga., ___F. 3d___, 2001 W.L. 166375 (11th Cir. Feb. 20, 2001) 5, 6

Forsblad v. Jepson, 292 Minn. 458 (1972) 5, 6

Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) 9

Kismet Investors v. County of Benton, 617 N.W. 2d 85, 94 (Minn. App. 2000) 5

INTRODUCTION

This brief is submitted as a reply brief, pursuant to Supreme Court Rule 15.5. It is submitted for the purpose of replying to Respondent's brief in opposition to the petition for writ of certiorari, dated, March 15, 2001. To the extent that any arguments raised in Respondent's brief in opposition are not specifically addressed in this reply brief, such omission should not be considered in agreement with or concession of the validity of said argument, but rather as only reflecting Petitioner's position that the argument is dealt with adequately in the original petition.

Because the brief will also bring to this Court's attention supplemental authority arising since the submission of the original petition, the brief should also be considered a supplemental brief, submitted pursuant to Supreme Court Rule 15.8.

STATEMENT OF FACTS

In its statement of facts, Respondent gives a highly distorted view of Petitioner's establishment and the alleged secondary effects it caused. This is readily apparent from viewing the partial transcript set forth in Respondent's Appendix.

To begin with, it should be noted that absolutely nothing in that testimony contradicted the McLaughlin report indicating that in the years since its existence, property values in the area surrounding King's Inn have increased at double the rate of Benton County as a whole and at four times the rate of the property surrounding a

business at a comparable location, without adult entertainment. (Appendix A.232-A.242). Nor does any of that testimony contradict the McLaughlin report indicating that during its years of existence, Petitioner's establishment generated, on the basis of area and seating capacity, fewer police calls than Rumor's Bar, a nearby alcohol establishment; absolutely fewer police calls than a local gas station and convenience store; and absolutely no sex offenses or drug crimes (Petitioner's Appendix at A.225-A.231).

Rather, Respondent relies upon the testimony of a single neighbor who complains about noise and trespassing in the parking lot (Respondent's Appendix at 24a-25a), and a neighbor complaining of "shocking details of threats from the establishment's owner." Id. at 28a-29a.

Concerning the problems in the parking lot, it is significant that the ordinance at issue in the instant case, even if fully implemented, would do absolutely nothing to alleviate those problems. As noted by the District Court in its memorandum opinion, under the language of the ordinance, as construed by the District Court, the 500-foot setback requirement from residentially zoned property is to be measured "from the building providing adult use to the property line of the adjacent residence or residences." Petitioner's Appendix at A.44. What this means is that so long as the building housing the adult entertainment is 500 feet away from the property line, the parking lot can be immediately adjacent to residentially zoned property and the ordinance is not violated.

With respect to "shocking threats," Respondent's counsel conveniently omitted from the transcript presented to this Court the response of Petitioner's counsel to those remarks, set forth in the reply Appendix at R.A.1, in which the complainant was advised that the proprietor Petitioner's establishment "has no intention of raping you or bringing gangs. He does have an intention of suing you immediately for the lies he told this audience," a defamation lawsuit which was indeed subsequently brought.

Finally, it should be noted even though the Board of Adjustment which heard the above-described testimony denied Petitioner's request for a variance, it did not rely upon any of the foregoing testimony as a based for denial. See the Board of Adjustment's findings set forth in Petitioner's Appendix at A.84-A.86.

ARGUMENT

I. A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER THE BENTON COUNTY ORDINANCE IS NARROWLY TAILORED TO THOSE USES FOUND TO CAUSE ADVERSE SECONDARY EFFECTS.

In its original petition, Petitioner argued that, on the basis the record presented to the court below, at minimum, a factual question existed as to whether the Benton County Adult Zoning ordinance was "narrowly tailored" to those uses found to cause adverse secondary effects, as required by this Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 52 (1986). None of the arguments advanced by Petitioner support rejection of that argument, and at least

two subsequent developments since the submission of the original petition support the argument.

Petitioner argues, without citation to authority, that so long as the ordinance was enacted "so as to address the adverse secondary effects attributable to a particular category of adult businesses," it meets the "narrow tailoring" requirement of *Renton*. The argument ignores the fact that the record in the court below plainly indicated that the modern "upscale adult cabaret" developed since most adult entertainment business studies were conducted, has no adverse secondary effects, a conclusion fully supported by the county's own data on property values in crime. See Petitioner's Appendix at A.120-A.127, A.225-A.242. This plainly places Petitioner's established outside the category of uses shown to cause adverse secondary effects, or at least creates a factual question as to whether it does.

Petitioner next argues that the record "included evidence that the presence of this particular business was causing harm and aggravation to neighboring residents." Respondent's brief p. 8.

As already noted, supra, much of that testimony was highly dubious and none refuted the county's own statistics on property value and crime. More significantly, at best, that testimony created a factual dispute requiring a trial, rather than a basis for summary judgment.[1]

---

[1]In this regard, it should be noted that the summary judgment standard under Rule 56 of the Minnesota Rules of Civil Procedure is identical to the standard adopted under Rule 56 of the Federal Rules of Civil Procedure, to-wit: that the

Even more significantly, two developments since the filing of the petition absolutely support Petitioner''s position.

To begin with, on March 5, 2001, this Court granted certiorari in the case of *Alameda Books, Inc. v. City of Los Angeles*, 222 F. 3d 719 (9th Cir. 2000). See ___U.S.___, 2001 W.L. 208720, 69 U.S.L. 3382 (March 5, 2001). Given the fact that the Minnesota Court of Appeals in the instant case at least implicitly found that the Benton County ordinance would not pass constitutional muster under the evidentiary standard adopted in *Alameda Books*, and upheld the ordinance only by rejecting such a standard,[2] at minimum, a decision on a writ of certiorari in the instant case should be withheld until *Alameda Books* is decided on its merits.

Secondly, since the time the original petition for writ of certiorari was filed, the United States Court of Appeals for the Eleventh Circuit decided *Flanigan's Enterprises, Inc. v. Fulton County, Ga*, ___F. 3d___, 2001 W.L. 166375 (11th Cir. Feb. 20, 2001). In that case, the court reversed the grant of summary

---

evidence of record is to be construed in the manner most favorable to the non-moving party. Compare *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970 and *Forsblad v. Jepson*, 292 Minn. 458 (1972). This fact is an obvious answer to Respondent's other argument, that a fact question is not raised by the conclusion of an expert witness whom the trial judge found not to be credible. Apart from the fact that Mr. McLaughlin did not merely render an opinion as to adverse secondary effects, he offered undisputed statistical evidence as to their absence, the fact is that credibility determinations are irrelevant upon motions for summary judgment.

2See *Kismet Investors v. County of Benton*, 617 N.W. 2d 85, 94 (Minn. App. 2000), Petitioner's Appendix at A.20.

judgment in favor of a defendant county upholding the validity of an ordinance prohibiting the sale of alcoholic beverages in an adult entertainment establishment. Prior to enacting the ordinance the County Board of Commissioners adopted a resolution stating it had reason to believe that consumption of alcoholic beverages in adult entertainment establishments would contribute to "increased crime and decreased property values," and directed the police department to conduct the study to verify the assumption. The resolution further stated that the Board intended "to enact, if warranted by said studies, a carefully tailored regulation to minimize the negative secondary effects" of such establishments. The police department responded to the directive by conducting a study comparing the number and types of police calls at 12 drinking establishments, six featuring adult entertainment and six did not. The study, conducted over a period in excess of two years, concluded that there was no statistical correlation between crime and adult entertainment establishments; but rather, the statistics indicated more police calls and greater frequency of crime at alcohol establishments which did not feature adult entertainment. Subsequently, the adult entertainment facilities themselves commissioned a study on the economic impact of the clubs on the surrounding neighborhood which study and indicated the effect of the clubs was "high occupancy and rental rates in existing buildings, expensive improvements, business expansion, turn-away business volumes and proposed development in the club's vicinities." The county itself retained its own appraiser, and while he criticized the

methodology used in the club's study, could not dispute its conclusion. The County Board of Commissioners enacted the restriction nonetheless. The Eleventh Circuit held that, under such circumstances, the county's regulation could not pass constructional muster stating:

> "Unlike in [*City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000)] and *Sammys [of Mobile, Ltd. v. City of Mobile*, 130 F. 3d 993 (11th Cir. 1998), cert. denied, 120 S. Ct. 1553 (2000)], where Plaintiffs never challenged the city's findings, the Fulton County clubs challenged and disproved the Board's findings, the evidence in the record relating to the conditions in Fulton County shows unequivocally that property values in the neighborhoods adjoining the Clubs have increased during the time the Clubs have been in existence, and that the surrounding buildings show no signs of blight, or lack of physical maintenance. Moreover, the Fulton County police study found greater reported crime connected establishments that served alcohol but did not feature adult entertainment. In other words, local studies commissioned both by the Clubs and the Board found no evidence of the secondary effects with which the Board was purportedly concerned. The question thus becomes, was it reasonable for Defendants to ignore relevant local studies and rely instead upon remote foreign studies in determining whether adverse secondary effects were attributable to the Fulton County clubs?
>
> We do not believe the Defendants had any reasonable justification for amending Sec. 18-76 when the County's own studies negated the very interests it purportedly sought to prevent. [Citation

> omitted.]...We recognize that a governmental entity is not required to perform empirical studies. [Citation omitted.] However, having done so, the Board cannot ignore the results. Local studies, including those commissioned by the county itself, revealed that the Clubs had less, up to half the incidence of crime than establishments that did not offer nude dancing, property values had increased in the Club's surrounding neighborhoods and the physical maintenance of the surrounding building no quantifiable blight. Accordingly, we find it was unreasonable for Defendants to rely on remote, foreign studies concerning secondary effects when the county's own, current empirical data conclusively demonstrated that such studies were not relevant to local conditions (footnoted omitted)."

Obviously, the identical fact situation exists in the instant case. The studies the county relied upon were all foreign and outdated, and, according to the uncontradicted affidavit submitted, plainly not relevant to the type of facility present in Benton County. Petitioner's Appendix at A.120-A.127. The decision of the Minnesota Court of Appeals to uphold a grant of summary judgment under such circumstances is plainly contrary to the recent decision of the 11th Circuit and should plainly be reviewed upon certiorari.

II. THE ORDINANCE WOULD HAVE THE EFFECT OF SUPPRESSING OR GREATLY LIMITING ACCESS TO CONSTITUTIONALLY PROTECTED SPEECH.

In its original brief, Petitioner argued that the Benton County ordinance failed to allow adequate alternative avenues of communication, within the meaning of *Renton*, since all locations

were available only at the discretion of the County Planning Commission. This is a result of the county's parking ordinance, which grants to the County Board of Commissioners the absolute discretion to determine the number of off-street parking spaces required, on an individual business basis, in order for a business to open.

In response the county argues that many of the lots in question are so large that they can accommodate any reasonable number of parking spaces. What the argument ignores is that the ordinance gives to the Planning Commission the absolute discretion always to require one more parking space than any lot of any size would permit.

Secondly, the county argues that any arbitrariness in allotting such space would be subject to prompt judicial review. Even if true, the argument is irrelevant. Where permission to engage in protected First Amendment rights is concerned, the problem is not the abuse of discretion but the very existence of discretion. The test is not whether government will exercise the discretion in a censorial manner, but rather whether there is anything on the face of the ordinance preventing it from doing so. If there is not, the ordinance is constitutionally invalid. See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), and *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).

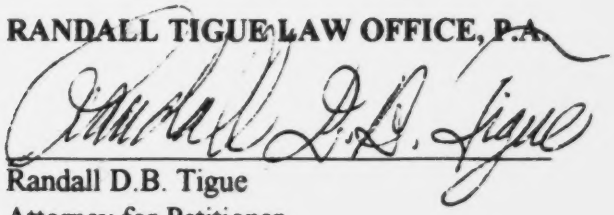
CONCLUSION

For all of the foregoing reasons, as well as those

advanced in the original petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

RANDALL TIGUE LAW OFFICE, P.A.



Randall D.B. Tigue
Attorney for Petitioner
Karmel Square Bldg., Suite 9
2940 Pillsbury Avenue South
Minneapolis, MN 55408
612/825-0936

Dated: March 25, 2001

REPLY APPENDIX

Transcript R.A.1

If it pays the bills, who cares what you do?"

MR. TIGUE: And I just have two brief comments. One is to Ms. Hoihjelle, you do not have to worry. Mr. Kellar has no intention of raping you or brining gangs. He does have an intention of suing you immediately for the lies you told this audience.

The final things are comments of the United States Supreme Court on the case of Planned Parenthood. Southeastern Pennsylvania versus Casey's (phonetic). He said – The United States Supreme Court says "Our obligation is to define the liberty of all, not to mandate our own moral code." That's the obligation of this body as well. Okay. Thank you.

MR. BINNIE: I think the Board has some questions.

MR. BUKOWSKI: I have two questions of Mr. Kellar. One is: Were you associated with the King's Inn before you purchased it?

MR. KELLAR: No.

MR. BUKOWSKI: And did you know that the nonconforming ordinance expired on the 31st when you purchased that place?

MR. KELLAR: No, sir, I did not.